IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 17, 2008

STATE OF TENNESSEE v. JOEL E. BLANTON

Direct Appeal from the Criminal Court for White County
No. CR-2079 Lillie Ann Sells and David A. Patterson, Judges

No. M2007-01384-CCA-R3-CD - Filed March 4, 2009

A White County jury found the Defendant, Joel E. Blanton, guilty of one count of rape of a child and two counts of aggravated sexual battery. The trial court sentenced him to an effective sentence of twenty-four years. On appeal, the Defendant contends: (1) the evidence presented was insufficient to support his convictions on all three counts; (2) the successor judge at the hearing on a motion for new trial improperly concluded that he could sufficiently familiarize himself with the record and act as the thirteenth juror; (3) the trial court erroneously instructed the jury with respect to the required mental state for rape of a child; (4) the trial court erroneously instructed the jury with respect to the required mental state for aggravated sexual battery; and (5) the trial court erroneously instructed the jury with respect to the definition of "knowingly." After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

G. Jeff Cherry, Lebanon, Tennessee (on appeal), and Billy K. Tollison, III, Sparta, Tennessee (at trial), for the Appellant, Joel E. Blanton

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Elizabeth B. Marney, Assistant Attorney General; Anthony J. Craighead, Interim District Attorney General; and Beth E. Willis, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

At trial the following evidence was presented: T.M.,[1] a twelve year old girl, testified that she had known the Defendant for eight years and that he was related to her stepfather, Bobby Blanton. T.M. described her relationship with the Defendant by saying they "were like brothers." T.M. recounted that she lived in a trailer with her mother, her older sister, her twin sister, and her mother's friend Pam Gibson. T.M. acknowledged that her stepfather was imprisoned in Nashville and that her mother visited him regularly. During one of those visits, on a date that T.M. could not recall, bad weather forced her mother to spend the night in Nashville. T.M. said that, on that night, she shared her usual bedroom with her twin sister S.M.; B.M., her older sister, slept in their mother's bedroom. T.M. stated that, while she was sleeping, the Defendant "crawled in between [her] and [S.M.] and he [woke her] up by sticking his finger down [her] pants and then in [her] vagina." She was wearing underwear, pajama pants, and a t-shirt at the time. T.M. said that "[i]t hurt" and that she asked the Defendant to stop. She said the Defendant "asked if it felt good." After the Defendant removed his hand from inside her pants, "[h]e just rolled over and [she] just rolled over and went back to sleep." T.M. said she did not observe the Defendant touch S.M.

When Gibson and B.M. entered the bedroom "to check on [the girls]," at some point later that night, T.M. "went to the bathroom to change to shorts." She stated that "[i]t hurt when [she] used the bathroom." After using the bathroom, T.M. returned to bed, where the Defendant remained between her and S.M. When the Defendant eventually left the room, he put his finger over his mouth and said "shhh." T.M. related that she was scared because she thought that he meant "[d]on't tell anyone." T.M. said when she told S.M. what he had done to her, S.M. disclosed that the Defendant had done the same thing to her. The next morning, T.M. noticed "spots of blood in the thing when [she used] the bathroom." That same morning, T.M. neither spoke to the Defendant nor told her mother about what happened. She said she "was scared that if someone found out that [the Defendant] was going to do something." T.M. told her mother what happened two years after the incident.

On cross-examination, T.M. said Gibson's children, Jonathan, Cody, and Nickie, were at her house the night of the incident. T.M. stated that the Defendant had not visited her house since the incident. She also said that she first told B.M. about the incident and that she then told her mother.

S.M. testified that she had known the Defendant about eight years. She said she shared a bed with T.M. the night her mother was "snowed in" in Nashville. B.M. usually slept in the same room but slept in her mother's room that night. She said the Defendant came into her bedroom and lay in the bed between her and T.M. S.M. recounted, "I don't know what was happening, but he was faced towards [T.M.]. And then like five minutes, I think, later he turned over to me." She continued, "I don't know how it got started . . . but he had stuck his hand down my pants. . . . [And he] stuck his finger up my vagina." S.M. said the Defendant asked her "if it felt good." She said she

[1] Due to the nature of the charges, we will refer to the child victims by their initials.

told him to stop, but he kept his finger in her for "probably over five minutes." She said he then "stopped and he turned back over and then [she] fell asleep." As the Defendant left the room, "he turned around and he put his finger over his mouth and said ['']shhhh, don't tell anybody.['']" S.M. said she talked to him the next morning, and she did not tell her mother about the incident for over two years.

On cross-examination, S.M. testified that she did not tell anyone about the incident even after she told her mother. She initially agreed that, the morning after the first incident, the Defendant touched her inappropriately again, but, upon further questioning, she denied remembering the second incident. On redirect examination, S.M. clarified that the second incident occurred on the same night as the first and was before dawn. She said that she thought something had happened to her sisters that same night. On recross-examination, S.M. further clarified that the Defendant touched her the second time while it was still dark outside but after her mother and Gibson had gone to the store.

B.M. testified that she knew the Defendant as her stepfather's cousin. She said he came to their home "on many occasions." She said she felt she could trust him and was comfortable around him. B.M. related that the night the Defendant was in her home, she began the night sleeping in her mother's room with the Defendant, Gibson, and Gibson's son Jonathan. At some point during the night, Jonathan became ill, and Gibson took him to another room.

Recounting how the Defendant inappropriately touched her, B.M. said, "I felt something wet against my back and for some reason I just had a strange feeling and jumped up and I was like ['']no, no, no.['] And he was like ['']all right, all right, I won't do anything.['']" She was wearing shorts, a shirt, and underwear at the time. B.M. continued, "So I got back in bed and I went to go back to sleep and he turned me over and took down my pants and started messing around with me down in my lower area." B.M. said, "[The Defendant then] took his finger and was playing around where I use the number one out." He asked her "if it felt good," and he kept his hand on her genital region for "a minute [or] two." She said that after he stopped "[they] were laying there and then he went up under the covers and [she] felt him kiss [her] stomach and then [Gibson] came in the room and he jumped from where he was laying with [her] like over to the other side of the bed." After Gibson walked into the room and saw B.M. and the Defendant in the bed, she called for B.M. to come into the hallway. B.M. recalled that the Defendant then told her not to say anything. When B.M. arrived in the hallway, Gibson asked B.M. if anything happened, and she said no. B.M. said she spent the rest of the night sleeping in the bedroom with her sisters. B.M. told her mother about the incident two years after it happened.

On cross-examination, B.M. said Gibson was dating the Defendant on the night he stayed at their house. B.M. said she felt the Defendant "[take] his finger and like right there where you pee at he was rubbing around right there in that area." She said she "felt his nails scratch [her] and that hurt." She also said the Defendant came to their home after the night of the incident to help shave their dog.

Tammy Blanton,[2] the mother of the victims, testified that between January 9, 2001, and February 22, 2001, she lived with her three daughters and Gibson in a trailer in Sparta, Tennessee. B.M. was ten years old, and T.M. and S.M. were seven-year-old twins. Tammy recalled that one night during that time period, she visited her husband while he was incarcerated in Nashville. The roads became snowy, so she stayed in Nashville for the night. Tammy said her children were at home with Gibson and Gibson's three children. Tammy said the Defendant visited her home often while they lived at the trailer. Tammy testified that, two years after the incident, her daughters told her what the Defendant did to them. She said she called the police, who, along with Children's Services, questioned her daughters. She also had them physically examined by a nurse practitioner.

On cross-examination, Tammy said that she had a "great" relationship with her daughters. She admitted she was convicted of felony theft in 2000. She said the Defendant visited her house twice after the night of the incident, and she has talked on the telephone with him since the incident. On redirect examination, Tammy stated that she successfully completed her three year probation period for the theft conviction.

Pam Gibson testified that she lived with Tammy Blanton, B.M., S.M., and T.M. in the trailer. She was dating the Defendant during the early months of 2001. Gibson said that, during the night that Tammy stayed in Nashville, Jonathan and B.M. were in Tammy's room with her and the Defendant. During the night, Jonathan became ill, so Gibson took him to sleep in another room. When Gibson returned to the bedroom, "[B.M.] was laying against the wall and [the Defendant] was right up against her with his arm around her." The Defendant "jerked his arm back" when he saw Gibson standing there. Gibson asked B.M. if anything happened with the Defendant because she "had a bad feeling" that the Defendant had done something to B.M. B.M. denied that the Defendant had done anything. Gibson said that, after she had B.M. move to the other bedroom to sleep, Gibson played on the computer with the Defendant. She said he then went outside, and she "could hear he had been hitting his fist or something against the outside of the wall or the porch." Gibson did not mention any of her suspicions to Tammy because B.M. denied that the Defendant did anything. Gibson added that, at some point that evening, her cousin and her cousin's boyfriend stopped by the trailer for ten to fifteen minutes to drop off cigarettes and Mountain Dew.

On cross-examination, Gibson clarified that she was asleep in bed with Jonathan, B.M., and the Defendant. Her cousin then arrived, and Jonathan subsequently became ill. Gibson explained that the Defendant spent the night at the trailer because he was "going to [Guard] drill the next morning." Gibson admitted she had been convicted of passing worthless checks.

Gibson then answered the jury's questions. She said the children went to bed around 8 P.M., and she played on the computer until some point before midnight. Her cousin also came to the trailer at some time before midnight. Gibson stopped dating the Defendant soon after the incident, but the Defendant continued to visit the family after they moved houses. Gibson said she did not know

[2] Because of the multiple witnesses that testified with the same surname of Blanton, we will refer to each of those witnesses using his or her first name. We mean no disrespect.

whether the Defendant went into the room the twins were sharing.

Detective Chris Issam with the White County Sheriff's Department testified that he was the lead detective investigating this case. He said the Defendant admitted to being present at Gibson's house the night in question and sleeping in the same bed as S.M. On recross-examination, Issam stated that the Defendant had always denied touching the girls.

For the defense, Linda Stover, a family nurse practitioner, testified that she performed a physical examination, which included a genital area exam, of B.M., S.M., and T.M. She said that all of the girls had their hymenal rings still intact with "no sign of injury, tearing," which was normal for the girls' ages. Stover also stated that she could not determine whether someone had "stuck their hand or finger inside [their] vagina[s]."

On cross-examination, Stover said that Tammy brought the girls in for the examination and was present for each examination. Stover acknowledged that, unless the touching occurred over a prolonged period, physical evidence of such contact was unlikely to remain, given that the incident was two years prior to the examination. On redirect examination, Stover said a tear in the hymenal ring could cause bleeding. On recross-examination, Stover stated that being scratched or falling off a bicycle could also cause vaginal bleeding.

Dana Goney, the Defendant's girlfriend, testified that, when she visited the girls' house with the Defendant in 2004, "[the girls] were cutting up and laughing with [Goney] and [the Defendant]. The oldest one was trying to shave the dog's hair and had asked [the Defendant] to help her." She did not perceive the girls to be afraid of the Defendant.

The Defendant testified that he was nineteen or twenty years old at the time of the incident. He stated that he had four children at the time of trial. He also said that he was around the girls' house eight to ten times after February 2001 and that they never acted afraid of him. The Defendant denied touching B.M., S.M., and T.M. The Defendant admitted having previous convictions including criminal impersonation, theft, and forgery.

On cross-examination, the Defendant testified that he used to be like a brother to Bobby Blanton. He believed that either Bobby or Tammy "put [the girls] up to" accusing him of rape. The Defendant denied being at the house the night Tammy was away in Nashville. He said that he did not spend the night at their house but that he visited the house later to show Tammy his new truck. The Defendant then admitted to every conviction listed on his criminal record.

When answering questions posed by jury members, the Defendant stated that he had three children by his ex-wife and one child by Dana Goney. He said he broke up with Gibson because she could not have children, and he wanted to have children.

After hearing the evidence, the jury convicted the Defendant of one count of rape of a child and two counts of aggravated sexual battery.

B. Sentencing Hearing

At the sentencing hearing, the following evidence was presented: Mark Ledbetter of the Probation and Parole Department testified about the pre-sentence report that he prepared. He listed the Defendant's convictions, which included: three counts of forgery up to $1000; two counts of theft of property valued between $500 and $1000; two counts of theft of property valued less than $500; unlawful possession of a firearm; criminal trespassing; possession of a weapon with the intent to go armed; AWOL from National Guard; criminal impersonation; and contributing to the delinquency of a minor. At the time of the sentencing hearing, the Defendant also had a pending charge of felony escape from jail. Although the Defendant claimed to have earned his GED, Ledbetter had not been able to verify that. On cross-examination, Ledbetter acknowledged that the Defendant had only one conviction before the date of the incident.

Dana Goney, the Defendant's girlfriend and mother of two of his children, testified that she would like the Defendant to have a short sentence so that he could help her raise the children. She said that she felt the Defendant had treated her well. On cross-examination, Goney stated that she did not aid the Defendant after he escaped from jail and that she knew he escaped by reading the papers and receiving a phone call from the Tennessee Bureau of Investigation. Goney also said that she considered the Defendant a good father notwithstanding his multiple convictions.

Darlene Blanton, the Defendant's mother, testified that the Defendant had five children. She described him as a good father and said his children ask for him daily.

Teresa Blanton, the Defendant's older sister, testified that she was close to the Defendant. She described the Defendant as "the peacemaker" with a "big heart."

Roy Glynn Blanton, the Defendant's father, testified that he will likely be deceased when the Defendant is released from prison. He added that "[the Defendant has] been a real good father to his children and he's always been honest."

David Yates, the Defendant's uncle, testified that he saw the Defendant periodically. He stated, "If you told me he burned the courthouse down I'd believe you. But these things that he's charged with here, I just, I just don't believe he's guilty of them." Yates continued, "[I]t's just not in his nature."

The trial court considered the evidence presented, along with the victim impact statements and the pre-sentence report, and it ordered the Defendant to serve twenty-four years for the rape of a child conviction and eleven years for each aggravated sexual battery conviction. The trial court ordered the sentences to be served concurrently, for a total effective sentence of twenty-four years. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends: (1) the evidence presented was insufficient to support his convictions on all three counts; (2) the successor judge at the hearing on a motion for new trial improperly concluded that he could sufficiently familiarize himself with the record and act as the thirteenth juror; (3) the trial court erroneously instructed the jury with respect to the required mental state for rape of a child, which violated the Defendant's rights to due process and a jury trial; (4) the trial court erroneously instructed the jury with respect to the required mental state for rape of a child, which violated the Defendant's rights to a jury trial and an unanimous verdict; (5) the trial court erroneously instructed the jury with respect to the required mental state for aggravated sexual battery, which violated the Defendant's rights to due process and a jury trial; (6) the trial court erroneously instructed the jury with respect to the required mental state for aggravated sexual battery, which violated the Defendant's rights to a jury trial and a unanimous verdict; and (7) the trial court erroneously instructed the jury with respect to the multiple component mental state elements of "knowingly," which violated the Defendant's due process. Due to the similar nature of claims (3) through (7), we will combine them and address them as one issue.

A. Sufficiency of the Evidence

The Defendant claims the evidence presented was not sufficient to support his convictions of one count of rape of a child and two counts of aggravated sexual battery. The State disagrees.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "'A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (quoting *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor

> on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Tennessee Code Annotated defines the crime of rape of a child as "the unlawful sexual penetration of a victim by the defendant . . . if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522(a) (2001). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of the victim's . . . body, but emission of semen is not required." T.C.A. § 39-13-501(7) (2001).

Aggravated sexual battery is "unlawful sexual contact with a victim by the defendant . . . accompanied by any of the following circumstances . . . (4) The victim is less than thirteen (13) years of age." T.C.A. § 39-13-504(a)(4) (2001). "'Sexual contact' includes the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6) (2001). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." T.C.A. § 39-13-501(2) (2001).

The Defendant was convicted of rape of a child on count one, which involved T.M. The evidence, when considered in the light most favorable to the State, showed T.M. was sleeping in the bed with her twin sister when the Defendant woke her by sticking his hand in her pants. He then placed his finger in her vagina, which caused her physical pain that night and the next morning. T.M. was seven years old at the time. This evidence is sufficient to support the conviction of rape of a child, which requires that the Defendant unlawfully sexually penetrated a victim who is under age thirteen.

The Defendant was convicted of aggravated sexual battery on count two, which involved S.M. On the night in question, S.M. was sleeping in the same bed as her sister T.M. The Defendant woke her up when he came into the room. Later, after he had faced T.M. for "like five minutes," he inserted his hand down S.M.'s pajama pants and put one of his fingers in her vagina. S.M. was seven years old at the time. This evidence is sufficient to show that the Defendant had intentional sexual contact with the victim and that the victim was less than thirteen years old. The evidence

supports the conviction of aggravated sexual battery.

The Defendant was also convicted of aggravated sexual battery on count three, which involved B.M. B.M. was asleep in her mother's bed with the Defendant, Gibson, and Gibson's son when Gibson and her son left the room. At that point, the Defendant began "messing around with [her] down in [her] lower area." She described that "[h]e took his finger and was playing around where [she] use[d] the number one out." After the Defendant stopped fondling B.M., he kissed her stomach. B.M. was ten years old at the time. This evidence is sufficient to show that the Defendant had intentional sexual contact with the victim and that the victim was less than thirteen years old at the time. The evidence supports his conviction for aggravated sexual battery.

In summary, the evidence is sufficient to support each of the Defendant's convictions. The Defendant is not entitled to relief on this issue.

B. Thirteenth Juror

The Defendant claims that the successor judge, Judge David K. Patterson, who presided over the hearing on the motion for a new trial, improperly concluded that he could sufficiently familiarize himself with the record and act as the thirteenth juror. More specifically, the Defendant argues that Judge Patterson wrongly found that Judge Lillie Ann Sells, who presided at the trial, approved the guilty verdict as the thirteenth juror. The Defendant further argues that Judge Patterson could not properly evaluate whether to grant the motion for new trial, especially considering that one of the issues raised was sufficiency of the evidence. The Defendant claims Judge Sells's comments approving the verdict were gratuitous and non-binding because they were not in response to a motion. Additionally, the Defendant claims that the credibility of the witnesses was a major issue in this case, given that the critical evidence consisted of conflicting testimony from each victim and the Defendant. Since credibility was such an issue, the Defendant asserts that the successor judge must grant a new trial because he would be sitting as the thirteenth juror and ruling on the motion for new trial without having personally seen the evidence presented. The State argues that the presiding trial judge, Judge Sells, properly performed her duty as the thirteenth juror and that the successor judge properly denied the motion for new trial. We will address each facet of the Defendant's claim in turn.

Tennessee Rule 33 of Criminal Procedure states that a "trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." Tenn. R. Crim. P. 33(d). This rule "'is the modern equivalent to the thirteenth juror rule, whereby the trial court must weigh the evidence and grant a new trial if the evidence preponderates against the weight of the verdict.'" *State v. Biggs*, 218 S.W.3d 643, 653 (Tenn. Crim. App. 2006) (quoting *State v. Blanton*, 926 S.W.2d 953, 958 (Tenn. Crim. App. 1996)). The initial sub-section of Rule 33 states, "On its own initiative or on a motion of a defendant, the court may grant a new trial as required by law." Tenn. R. Crim. P. 33(a). Moreover, after considering the legislature's intent and the prior thirteenth juror rule, the Tennessee Supreme Court interpreted Rule 33 as "impos[ing] upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case." *State v.*

Carter, 896 S.W.2d 119, 122 (Tenn. 1995). It also concluded that "approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment." *Id.*

The Defendant relies on *State v. Biggs*, in which this court ruled that the successor judge was required to grant a new trial because the presiding judge did not rule as the thirteenth juror and unresolved credibility issues remained. 218 S.W.3d at 654. We distinguish this case from *Biggs* based on the presiding judge's statements about the verdict. In *Biggs*, the presiding judge said, "If that's the verdict of each and every one of you on the jury, would you so indicate by raising your right hand, please? All right. Thank you." *Id.* The judge then spoke to the defendant: "Mr. Biggs, based on the finding of the jury that you are guilty of the lesser-included offense of aggravated sexual battery, it is the judgment of the Court that you are guilty of aggravated sexual battery." *Id.* The *Biggs* judge's statements were ambiguous to whether he approved of the jury's verdict. *Id.* Contrast that scenario with the facts from the presiding judge in *State v. Ernest L. McCormick* said. No. 01CO1-9502-CC-00027, 1995 WL 580854, at *9 (Tenn. Crim. App., at Nashville, Oct. 4, 1995), *no Tenn. R. App. P. 11 application filed*. In *McCormick*, this Court held that the trial judge ruled as a thirteenth juror by saying, "I accept this verdict" after the jury returned a guilty verdict. In the case under submission, after Judge Sells heard the jury's verdict, she explicitly adopted the jury's verdict as the thirteenth juror, saying, "Let the record reflect that the court adopts the jury's verdict and agrees with the jury's verdict as a thirteenth juror as to the return of the jury, one count of child rape and two counts of aggravated sexual battery." Judge Sells's statement more closely resembles the trial court's words in the *McCormick* case, as opposed to the trial court's words in the *Biggs* case. Thus, we conclude Judge Sells clearly fulfilled her duty as the thirteenth juror in this case.

The Defendant claims that Judge Sells lacked authority to rule as the thirteenth juror because neither party moved that she do so. Because the trial court has a mandatory duty to serve as the thirteenth juror in every criminal case, we conclude that Judge Sells's fulfilling that duty was properly within her authority. *See Carter*, 896 S.W.2d 119, 122; *see also* Tenn. R. Crim. P. 33. This issue is without merit.

We also disagree with the Defendant's claim that Judge Patterson erred in concluding that he could properly evaluate the case. In a trial, after a verdict of guilt has been reached, and the presiding trial judge cannot proceed due to absence, then a new judge may preside over the motion for new trial. Tenn. R. Crim. P. 25(b). "The successor judge may grant a new trial when that judge concludes that he or she cannot perform [the court's] duties because of the failure to preside at the trial or for any other reason." Tenn. R. Crim. P. 25(b). When becoming familiar with a case, the successor judge must sufficiently "familiarize" himself with the record. *State v. Bilbrey*, 858 S.W.2d 911, 913-14 (Tenn. Crim. App. 1993).

In this case, Judge Patterson ruled on the motion for new trial and on sentencing. All factual evidence about guilt had been presented and ruled upon. The jury returned a guilty verdict, and Judge Sells approved it as the thirteenth juror. Thus, Judge Patterson did not review any credibility issues, and he did not sit as the thirteenth juror. At the hearing on the motion for new trial, Judge

Patterson described his familiarity with the case, saying:

> I have listened to the tape recorded trial testimony in all of the trial that was taped from the voir dire through the motions, all testimony, opening and final arguments. And so I have made myself completely familiar with this case as far as a person can do this.
>
> I have reviewed the charge that was given to the jury as it was given by Judge Sells.
>
> In regards to the trial tape and the recording that I listened to, I have heard all the questions that have been posed by the attorneys, all of the answers that have been given by every witness. I have heard all of the court's comments and all of the rulings that have been made by the court during trial. I have heard the pauses, the inflections, the voice tone and the volume. I know the ease or difficulty that the witnesses have had in their responses.
>
> . . . .
>
> I'm prepared . . . as a person can be, I believe, and as prepared as Judge Sells would have been.

Judge Patterson made a similar statement at the commencement of the sentencing hearing. After considering Judge Patterson's preparation for the hearing on the motion for a new trial and the sentencing hearing, we conclude that he sufficiently familiarized himself with the case. Judge Patterson had authority to rule on the motion for new trial and sentence the Defendant. The Defendant is not entitled to relief on this issue.

C. Jury Instructions with Respect to the *Mens rea* for Rape of a Child and Aggravated Sexual Battery (Defendant's Issues III, IV, V, VI, and VII)

The Defendant claims the trial court erred by erroneously instructing the jury with respect to the required *mens rea* for the crimes rape of a child and aggravated sexual battery. The State argues that the Defendant waived these issues by not raising them in the motion for new trial, and, in the alternative, the Defendant failed to prove the breach of a clear and equivocal rule of law. We agree with the State.

The Defendant and the State agree that the Defendant failed to raise this issue in the motion for a new trial. According to Tennessee Rule 3(e) of Appellate Procedure, "no issue presented for review shall be predicated upon error . . . in jury instructions granted or refused . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." The Advisory Commission Comments add that "relief need not be granted to a party who fails to take whatever action is reasonably available to prevent or nullify the harmful effect of error." The

Defendant waived this issue of the jury instructions because he did not raise it in the motion for new trial. Therefore, this court may only review the issue of jury instructions for plain error. Tenn. R. Crim. P. 52(b) ("When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial . . . .")

When deciding whether plain error exists, we consider five factors:

(a) the record must clearly establish what occurred in the trial court;
(b) a clear and unequivocal rule of law must have been breached;
(c) a substantial right of the accused must have been adversely affected;
(d) the accused did not waive the issue for tactical reasons; and
(e) consideration of the error is "necessary to do substantial justice.

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson,* 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). All five factors must be present, and the error must be so grievous that it affected the outcome of the trial. *Id.* at 283.

We now turn to address whether a clear and unequivocal rule of law was breached as to the *mens rea* instructions to the jury. A trial court has the duty, in criminal cases, to fully instruct the jury on the general principles of law relevant to the issues raised by the evidence. *See State v. Burns*, 6 S.W.3d 453, 464 (Tenn. 1999); *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *State v. Elder*, 982 S.W.2d 871, 876 (Tenn. Crim. App. 1998). Nothing short of a "'clear and distinct exposition of the law'" satisfies a defendant's constitutional right to trial by jury. *State v. Phipps*, 883 S.W.2d 138, 150 (Tenn. Crim. App. 1994) (quoting *State v. McAfee*, 737 S.W.2d 304 (Tenn. Crim. App. 1987)). In other words, the court must instruct the jury on those principles that are closely and openly connected with the facts before the court, which are necessary for the jury's understanding of the case. *Elder*, 982 S.W.2d at 876. Because questions of the propriety of jury instructions are mixed questions of law and fact, our standard of review here is *de novo*, with no presumption of correctness. *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001); *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001).

Generally, "a defendant has a constitutional right to a correct and complete charge of the law." *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990), *superceded by statute on other grounds as stated in State v. Reid*, 91 S.W.3d 247 (Tenn. 2002). When reviewing jury instructions on appeal to determine whether they are erroneous, this Court should "review the charge in its entirety and read it as a whole." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997) (citing *State v. Stephenson*, 878 S.W.2d 530, 555 (Tenn. 1994)). The Tennessee Supreme Court, relying on the words of the United States Supreme Court, has noted that:

> [J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with

> commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (quoting *Boyde v. California*, 494 U.S. 370, 380-81 (1990)). A jury instruction is considered "prejudicially erroneous" only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *Id.* Even if a trial court errs when instructing the jury, such instructional error may be found harmless. *State v. Williams*, 977 S.W.2d 101, 104 (Tenn. 1998).

In Tennessee, there are four culpable mental states: intentionally, knowingly, recklessly, and criminally negligent. *See* T.C.A. § 39-11-302 (2006). If the statute defining the offense does not plainly dispense with a mental element, then "intent, knowledge, or recklessness suffices" to establish the culpable mental state. T.C.A. § 39-11-301(c); *State v. Page*, 81 S.W.3d 781, 786 (Tenn. Crim. App. 2002); *State v. Chester Wayne Walters*, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034, at *12 (Tenn. Crim. App., at Nashville, Nov. 30, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005). If the elements of an offense have distinctly varying *mens rea*, then the trial court must clearly instruct the jury about the mental state for each element. *State v. Howard*, 926 S.W2d 579, 587 (Tenn. Crim. App. 1996), *overruled on other grounds in State v. Williams*, 977 S.W.2d 101 (Tenn. 1998). "Each of these mental states is defined with reference to two or three of the following possible conduct elements: (1) nature of defendant's conduct, (2) circumstances surrounding the defendant's conduct, and (3) result of the defendant's conduct." *Page*, 81 S.W.3d at 787 (citing T.C.A. § 39-11-302). "'Intentional' refers to a person who acts intentionally with respect to the *nature* of the conduct or to a *result* of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." T.C.A. §39-11-302(a) (2006) (emphasis added). "'Knowing' refers to a person who acts knowingly with respect to the conduct or to *circumstances* surrounding the conduct when the person is aware of the *nature* of the conduct or that the *circumstances exist*." T.C.A. §39-11-302(b) (2006) (emphasis added). A person can also act knowingly "with respect to a *result* of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." T.C.A. §39-11-302(b) (emphasis added). "'Reckless' refers to a person who acts recklessly with respect to *circumstances* surrounding the conduct or the *result* of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." T.C.A. §39-11-302(c) (2006) (emphasis added).

As previously stated, the Defendant claims the trial court erred when it instructed the jury on the *mens rea* for both rape of a child and aggravated sexual battery. Rape of a child requires "the unlawful sexual penetration of a victim by the defendant . . . if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522(a). Rape of a child contains all three conduct elements. *Walters*, 2004 WL 2726034, at *14. Because the statutory definition of rape of a child does not plainly dispense with a mental element, intent, knowledge, or recklessness suffices to establish the culpable

mental state. T.C.A. § 39-11-301(c); *Walters*, 2004 WL 2726034, at *14;[3] *State v. Barney*, 986 S.W.2d 545, 550 (Tenn. 1999). Moreover, the Committee on Pattern Jury Instructions "is of the opinion that the definitions of 'intentionally,' 'knowingly,' and 'recklessly' should all be charged for this offense." T.P.I. Crim. 10.12 Cmts. Thus, each element of rape of a child may be met by proving the defendant acted intentionally, knowingly, or recklessly. *See Walters*, 2004 WL 2726034, at *14.

The trial court initially instructed the jury as to rape of a child:

> Any person who commits the offense of rape of child is guilty of a crime. For you to find the defendant guilty of this offense the state must have proven beyond a reasonable doubt the existence of the following essential elements.
>
> Number one, that the defendant had unlawful sexual penetration of the alleged victims in this case or the alleged victim had unlawful sexual penetration of the defendant. And as you'll recall there are three counts with three separate children, count one is [T.M.], count two is [S.M.], and count three is [B.M.].
>
> And the second element is that the alleged victims was [sic] less than thirteen years of age at the time.
>
> And then number three is that the defendant acted either intentionally or knowingly or recklessly.

The trial court then instructed the jury on definitions of "intentionally," "knowingly," and "recklessly":

> The word intentionally, the legal definition means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct

[3] We note that there is a split in this Court about whether recklessness is a culpable mental state for rape of a child and aggravated sexual battery. In *State v. Jeffrey L. Marcum*, this Court held that rape of a child and aggravated sexual battery are nature of the conduct offenses in its discussion on lesser-included offenses of rape of a child. No. W2000-02698-CCA-R3CD, 2002 WL 1473603, at *9 (Tenn. Crim. App., at Jackson, Jan. 23, 2002), *rev'd on other grounds* 109 S.W.3d 300 (Tenn. 2003). This Court cited *Marcum* in *State v. Weltha Womack*, which held that for aggravated rape, also a nature of the conduct offense, it was reversible error when the trial court instructed the jury on recklessness for that crime. No. E2003-02332-CCA-R3-CD, 2005 WL 17438, at *9 (Tenn. Crim. App., at Knoxville, Jan. 4, 2005), *no Tenn. R. App. P. 11 application filed.* Again, in *State v. Charles L. Williams*, this Court concluded that recklessness was not a culpable mental state for rape of a child. No. M2005-00836-CCA-R3-CD, 2006 WL 3431920, at *25-28 (Tenn. Crim. App., at Nashville, Nov. 29, 2006), *no Tenn. R. App. P. 11 application filed.* In contrast to that line of cases is *State v. Walters*, which concluded that intentional, knowledge, and reckless were sufficient *mens reas* for both rape of a child and aggravated sexual battery. We chose to follow the *Walters* opinion.

when it's the person's conscious objective or desire to engage in the conduct or to cause the result.

The word knowingly means that a person acts knowingly with respect to the conduct or to the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.

A person acts knowingly with respect to a result of the person's conduct when the person is aware the conduct is reasonably certain to cause the result.

. . . .

The word recklessly means that a person acts recklessly with respect to the circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature as [sic] degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The Tennessee Code Annotated defines aggravated sexual battery as the "unlawful sexual contact with a victim by the defendant . . . accompanied by any of the following circumstances . . . (4) The victim is less than thirteen (13) years of age." T.C.A. § 39-13-504(a)(4). "'Sexual contact' includes the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6). This Court has held that aggravated sexual battery contains all three conduct elements of nature of conduct, circumstances of conduct, and result of conduct. *Walters*, 2004 WL 2726034, at *14. Even though the Code expressly provides that the sexual contact must be intentional, it does not enunciate or plainly dispense with the culpable mental state required for the other elements of aggravated sexual battery; therefore, reckless conduct is sufficient for the element that the victim is less than thirteen years old. *State v. Parker* 887 S.W.2d 825, 827 (Tenn. Crim. App. 1994).

The trial court instructed the jury on the lesser-included offense of aggravated sexual battery:

[A]ny person who commits the offense of aggravated sexual battery is guilty of a crime.

For you to find the defendant guilty of this offense the state must have proven beyond a reasonable doubt the existence of the following essential elements.

Number one, that the defendant had unlawful sexual contact with the alleged victim in which the defendant *intentionally* touched the alleged victim's intimate

parts or the clothing covering the immediate area of the alleged victim's intimate parts;

And number two, the victim, the alleged victim was less than thirteen years of age;

And number three, that the defendant acted either intentionally, knowingly, or recklessly.

The words sexual contact includes the *intentional* touching of the alleged victim's, the defendant's or any other person's intimate parts or the intentionally touching of the clothing covering the immediate area of the alleged victim's, the defendant's, or any other person's intimate, coming over to the next page, parts or that intentional touching can be reasonable construed as being for the purpose of sexual arousal or gratification.

The words intimate parts include the primary genital area, the groin, the inter [sic] thigh, the buttocks or the breast of a human being.

The words victim, intentionally and knowingly and recklessly all listed on that page, the legal definitions have previously been read to you in the previous charge and you may refer back to them as you wish or as you need to.

(Emphasis added).

After reviewing these jury instructions and comparing them to the statutory elements of the offenses, we conclude that no breach of a clear or unequivocal rule of law occurred. The trial court properly instructed the jury with respect to the *mens rea* elements of rape of a child and aggravated sexual battery. As the statute required, the trial court instructed the jury that the mental states of intentional, knowing, and reckless satisfied the *mens rea* for each element of rape of a child. T.C.A. § 39-13-522. *See* T.C.A. § 39-11-301(c). *See also State v. Frederick Leon Tucker*, No. M2005-00839-CCA-R3-CD, 2006 WL 547991 (Tenn. Crim. App., at Nashville, Mar. 7, 2006) (holding that rape of a child jury instructions that did not include a specific mental state but included definitions of intentionally, knowingly, and recklessly "fairly defined the issues of the law and did not mislead the jury."), *no Tenn. R. App. P. 11 application filed*. Similarly, as the statute required, the sexual contact element of aggravated sexual battery was instructed to require a *mens rea* of intention, while the age of the victim element was instructed to require a *mens rea* of either intentional, knowing, or reckless. T.C.A. § 39-13-501, -504. *See* T.C.A. § 39-11-301(c). The Defendant has failed to prove that a clear and unequivocal rule of law was breached.

As part of his argument about the jury instructions on mental states, the Defendant also claims that, because the mental state instruction was given in the disjunctive, his right to an unanimous jury verdict was violated. The Defendant cites *State v. Page* and *State v. Forbes* as

support for this argument. 81 S.W.3d 781 (Tenn. Crim. App. 2002); 918 S.W.2d 431 (Tenn. Crim. App. 1995). "A defendant has the fundamental constitutional right under Tennessee law to a unanimous verdict before a conviction for a criminal offense may be imposed." *State v. James Clayton Young, Jr.*, No. 01C01-9605-CC-00208, 1998 WL 258466, at *5 (Tenn. Crim. App., at Nashville, May 22, 1998) (citing *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. Crim. App.1993)), *no Tenn. R. App. P. 11 application filed*. "Protection of this right may require special precautions by the trial court to ensure that the jury does not reach a 'patchwork verdict' based on different offenses." *Id.* (citing *State v. Forbes*, 918 S.W.2d 431, 445-46 (Tenn. Crim. App.1995)). In *State v. Hood*, the Court of Appeals addressed unanimous jury verdicts in the context of multiple culpable mental states and discussed *Page* and *Forbes*. 221 S.W.3d 531, 547 (Tenn. Ct. App. 2006). The court determined that "neither case stands for the proposition that the use of the word 'or' in listing alternative culpable mental states impinges on a defendant's constitutional right to a unanimous verdict." *Id.* Instead, the Court concluded that the use of the word "or" when listing the alternative culpable mental states for the offense of aggravated rape did not violate constitutional protections against non-unanimous jury verdicts. *Id*. at 547-48. Moreover, this Court has stated, "Generally, alternative theories, mental states, modes of committing the crime, or means by which the crime was committed may be submitted to the jury without the necessity of precautions to assure jury unanimity." *Young*, 1998 WL 258466, at *5 n.4. Accordingly, we conclude that the trial court did not violate the Defendant's right to a unanimous jury verdict when it instructed the jury on intentional, knowing, and reckless mental states with respect to rape of a child and aggravated sexual battery. Thus, we conclude there was no plain error, and, as such, the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and applicable law, we conclude that the evidence presented sufficiently supports the Defendant's convictions, the trial court properly exercised her duty as the thirteenth juror, the successor judge properly denied the motion for a new trial, and the trial court properly instructed the jury. As such, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE